84-1695 (1)

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

COUNTY OF MULTNOMAH, a home rule subdivision of the State of Oregon,
Petitioners,

and

THE CITY OF PORTLAND, OREGON, a political subdivision of the State of Oregon,
Petitioners,

v.

ACKERLEY COMMUNICATIONS, INC., a Washington corporation,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The opinion by the Ninth Circuit panel in this attorney's fee litigation raises issues central to defining the scope of a district court's discretion to deny a prevailing plaintiff attorney fees requested pursuant to 42 U.S.C. § 1988. Specifically, the opinion held that a district court lacks discretion to deny attorney fees to a prevailing plaintiff even though it finds that the prospect of fee shifting was not even marginally influential in the decision to litigate.

The Ninth Circuit, in a ruling that is likely to affect a wide range of local government regulatory programs, held that the district court considered improper factors in deciding to deny an attorney's fee to the plaintiff. Among other factors, the district court considered whether an award of an

attorney's fee was necessary to secure competent counsel and whether the cost of attorney's fees was a disincentive to the assertion of rights. The Ninth Circuit panel held that this factor was irrelevant and could not serve as a basis for denying an attorney's fee.

The Ninth Circuit panel also held that the district court could not consider the limited nature of the benefits achieved in declining to award attorney's fees. While the plaintiff did obtain a ruling that the ordinances in question contained a facial First Amendment defect, the real purpose of avoiding zoning regulations of billboards was not achieved.

The Ninth Circuit holding interprets 42 U.S.C. § 1988 as a reward for success in litigation, rather than an inducement to litigate. This conflicts with the Congressional intent

in enacting 42 U.S.C. § 1988. The holding greatly restricts a district court's discretion to deny attorney's fees to a prevailing plaintiff.

The fundamental legal questions posed by the Ninth Circuit's ruling are:

1. May a district court deny attorney's fees requested pursuant to 42 U.S.C. § 1988 when it finds that the prospect of fee shifting was not even marginally influential in the decision to litigate and was not needed to attract competent counsel?

2. May a district court deny attorney's fees requested pursuant to 42 U.S.C. § 1988 because a plaintiff prevailed only in a technical sense, without achieving the practical result sought by the plaintiff?

PARTIES TO THE PROCEEDINGS

Petitioners were among the appellees below. Petitioner County of

Multnomah (County) was an appellee-defendant- intervenor; petitioner City of Portland was an appellee-defendant. There was one other appellee-defendant, the City of Salem, Oregon, which petitioners believe has no interest in the outcome of this petition.

Respondent was the only appellant-plaintiff below.

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IN THE SUPREME COURT
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OCTOBER TERM, 1985

COUNTY OF MULTNOMAH, a home rule subdivision of the State of Oregon,
Petitioners,

and

THE CITY OF PORTLAND, OREGON, a political subdivision of the State of Oregon,
Petitioners,

v.

ACKERLEY COMMUNICATIONS, INC., a Washington corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners, County of Multnomah and City of Portland, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on January 30, 1985.

OPINION BELOW

The order of the district court has not been reported but appears as App. B in the Appendix. The opinion of the court of appeals is reported at 752 F.2d 1394 and appears as App. A in the Appendix. Because of its significance to this petition, the decision of the district court on the merits of this case, which has not been reported, is included as App. C.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1985. This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. (App. E.)

STATEMENT OF THE CASE

Respondent, an outdoor advertising company, brought these actions to challenge petitioners' ordinances that regulate outdoor advertising. Respondent's principal ground for its claim that the ordinances were invalid was that they effected a taking of property without just compensation. However respondent also asserted a First Amendment claim after lengthy litigation of a Highway Beautification Act issue.

The district court granted summary judgment for respondent, holding that the ordinances were facially invalid

because they could be interpreted as favoring commercial speech and certain forms of non-commercial speech over other forms of non-commercial speech. This ruling was based on Metromedia, Inc. v. City of San Diego, 453 U.S. 490, (1981), which was decided after cross-motions for summary judgment on the First Amendment issues had been filed.

Respondent sought an award of attorney fees under 42 U.S.C. § 1988. In its order, issued December 22, 1982, the district court recognized that the standard of awarding fees under this section is that a successful party should ordinarily recover an attorney fee unless special circumstances would render such an award unjust. Appendix at 20.

In reaching its decision that an award of attorney fees in this case

would be unjust, the district court considered the factors set out in Seattle School District No. 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980) aff'd 458 U.S. 457 (1982); Aho v. Clark, 608 F.2d 365 (9th Cir. 1979); Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979); and Zarcone v. Perry, 581 F.2d 1039 (2nd Cir. 1978). Appendix at 22.

First, the district court found that vindication of the right to political or non-commercial speech, was not respondent's primary objective. Respondent's goal was to prevent enforcement of ordinances that threatened it financially. Appendix at 23.

Second, the district court found that an award of fees would not further the purpose of 42 U.S.C. § 1988, which is to enable private citizens to retain

competent counsel to vindicate their civil rights. Respondent had no difficulty retaining competent counsel, and would have initiated these actions regardless of the possibility of recovering attorney fees. Appendix at 25.

Third, the district court reasoned that it would be inequitable to award attorney fees in this case because respondent did not seek a rapid determination of the First Amendment issues. Instead, it allowed the cases to drag on for more than five years while it lobbied and argued with petitioners over regulation of off-site commercial advertising. The district court reasoned that the First Amendment claim was only a means for respondent to attain its goal of preventing regulation of its commercial advertising. Appendix at 27.

The Ninth Circuit panel reversed and remanded for further proceedings. The panel found that there was "a complete absence of any showing of special circumstances to render the award of an attorney's fee unjust". 752 F.2d at 1398.

In his specially concurring opinion, Judge Sneed notes that the majority regards 42 U.S.C. § 1988 as both as an inducement to litigate and as a reward for success. This view, he writes, is consistent with prior case law. But Judge Sneed also notes that the district court's interpretation that 42 U.S.C. § 1988 was intended only as an inducement to litigate is consistent with the statutory language, and is the appropriate interpretation of that language.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has virtually extinguished the district court's discretion to deny a prevailing party attorney's fees under the statute. Exposure to liability for attorney's fees under 42 U.S.C. § 1988 is an issue of great importance to units of local government. Defining the circumstances under which a district court may decline to award attorney's fees therefore has a bearing on the decision to enact local regulatory programs, and on the local government's litigation strategy should the regulatory programs be challenged.

In enacting 42 U.S.C. § 1988, the Congress intended to remove financial impediments which might prevent, preclude or hinder private parties from being able to assert their civil rights. Perez v. University of Puerto

Rico, 600 F.2d 1 (1st Cir. 1979); Senate Report at p. 2, U.S. Code Cong. & Admin. News 1976, p. 5910.

The statute gives the district court discretion to allow the prevailing party attorney fees.

In this litigation, which respondent prosecuted to protect its billboard business (Appendix at 23), the court of appeals virtually extinguishes a district court's discretion to deny attorney's fees to the prevailing party. The court of appeals said:

> Attorney's fees under Section 1988 are thus not only an added burden to encourage voluntary compliance, but an entitlement to a prevailing party which encourages and facilitates access to the courts.

752 F.2d 1398. (Emphasis added.)

This notion -- that attorney's fees are an "entitlement" or right -- squares

neither with the language of, nor the congressional purpose for the statute.

I

The District Court Properly Concluded that the Necessity of an Award of Attorney's Fees to Attract Competent Counsel Was an Appropriate Factor to Consider in Ruling on a Request for Attorney's Fees Pursuant to 42 U.S.C. § 1988

The district court based its denial of fees on a variety of factors including the mixed nature of the outcome and its assessment of Respondent's conduct in this

litigation. The court also expressly considered the key factor of whether an award in this case would further the purposes of 42 U.S.C. § 1988. Appendix at 25. Seattle School District No. 1 v. State of Washington, supra, 633 F.2d at 1348.

The Ninth Circuit rejected this factor, stating that "[w]hether or not the action would have been brought in the absence of section 1988 is irrelevant". 752 F.2d at 1397. This holding ignores the Congressional intent in enacting § 1988, and mandates an award of attorney's fees even when the award does not further the purposes of § 1988.

There has not been much disagreement among the federal judiciary about the purposes of 42 U.S.C. § 1988. The Ninth Circuit's statement in Seattle School District

No. 1 v. State of Washington, supra, that the congressional purpose was to "eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law", 633 F.2d at 1348, has been echoed in numerous cases. For example, the First Circuit, in Perez v. University of Puerto Rico, 600 F.2d 1 (1st Cir. 1979), has stated, with reference to § 1988:

> Its [Congress'] goal was to remove financial impediments that might preclude or hinder "private citizens," collectively or individually, from being "able to assert their civil rights," Senate report at p. 2, U.S. Code Cong. & Admin. News 1976, p. 5910.

600 F.2d at 2. The Second Circuit, in Kerr v. Quinn, 692 F.2d 875, 877 (2nd Cir. 1982), has taken the same view:

> The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights

> claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.

(Emphasis added.) This interpretation of § 1988, including the need for preserving some district court discretion, is echoed in Hensley v. Eckerhart, 461 U.S. 424 (1983).

In the present case the district court took note of the legislative history of the Act itself, observing that its key purpose was to encourage civil rights enforcement by those whose access to the courts was effectively barred by financial constraints. Appendix at 25. The denial of Respondent's request was predicated, in part, on the court's determination that the Act was not passed to permit a plaintiff in Respondent's position to

avoid paying its own way. The court stated:

> Plaintiff in this case would have initiated legal action against the defendants regardless of whether it knew it could recover attorney's fees. Plaintiff would have retained competent counsel, just as it did. Indeed, in 1975 plaintiff could not have relied on an award of fees in this case because the remedy it seeks did not then exist.

Appendix at 25.

The district court was aware, having presided over the case for seven years, of the comparative resources of the parties. It was aware that Respondent had no trouble attracting highly competent counsel to pursue this litigation when it purchased the northwest billboard inventory of its predecessor in 1975, since Respondent specifically acknowledged the pendency of the Multnomah County litigation in its agreement to purchase. (District Court Case No. 75-733, CR 113, exhibit

to defendant and intervenor's brief on summary judgment.) The district court had no reason to believe that the prospect of paying its own attorney's fees deterred Respondent in any way from seeking relief in the federal court. This was certainly a relevant consideration in this § 1988 question.[1] Aho v. Clark, supra, 608

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1. Respondent's brief before the Ninth Circuit erroneously suggests that the court denied fees simply because § 1988 was not in force when the litigation was filed. Appendix at 24. This completely disregards the district court's discretionary assessment of Respondent's clear ability to attract competent counsel in the first place. Respondent's citation to Hutto v. Finney, 437 U.S. 678 (1978) reh. den. 439 U.S. 1122; Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979); and David v. Travisono, 621 F.2d 464 (1st Cir. 1980) underscores Petitioners' point. In each case the allowance of fees involved individual plaintiffs with limited means, not a large billboard corporation. Hutto and Travisono involved prison inmates. The plaintiff in Sethy was a water district employee.

F.2d at 367. The Ninth Circuit panel's refusal to consider this factor violates the Supreme Court's admonition to alter the American rule with respect to fees only to the extent required by the intent of Congress. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260-62 (1974).

II

The District Court Properly Determined that the Limited Nature of the Plaintiff's Success in Litigation Was an Appropriate Factor to Consider in Deciding to Deny Attorney's Fees.

The district court opinion in this case held that the plaintiff had technically prevailed because Petitioners' billboard regulations could be interpreted as containing a facial defect. In its decision on the attorney's fee issue, the court

described the nature of the ruling on the merits as follows:

> This court granted summary judgment for the Plaintiff holding the ordinances facially invalid because the ordinances as drawn could be interpreted as preferring commercial speech and certain forms of non-commercial speech over other forms of non-commercial speech. Hence, on the summary judgment motion, the issue was one of statutory interpretation.

(Emphasis added.) Appendix at 19. The district court, while recognizing that Respondent had prevailed in a technical sense, was also aware that on the central First Amendment issue (whether commercial billboards could be prohibited) the result was adverse to the Respondent. As the district court observed:

> The primary reason that fees will not be granted in this case is that the right which was vindicted [sic] in this case - the right to political or non-commercial speech - was not the primary objective of

> the plaintiff throughout this suit. The plaintiff was not primarily interested in furthering freedom of speech in this case; its objective was to find a way to keep the local government defendants from enforcing ordinances that threatened plaintiff financially.

(Emphasis added.) Appendix at 23.

Notably, the court made it clear, despite Respondent's contrary suggestion, that it did not intend by this language to say that an economic or business motive disqualifies a prevailing litigant from fees under 42 U.S.C. § 1988. Rather, the court underscored the point that the central issue in the litigation at hand was not determined in Respondent's favor. The court stated:

> Nor does the plaintiff's status as a business entity necessarily disqualify it from an award under § 1988 [citation omitted]. The distinction between this case and Vance, supra [Universal Amusement Corp. v. Vance, 587

> F.2d 159 (5th Cir. 1978)], lies in the centrality of the constitutional issue to the respective suits.

Appendix at 24.

The district court had discretion, in considering Respondent's fee request, to assess the mixed outcome obtained by Respondent on the central issues in the case. It could reasonably conclude that Respondent may have technically prevailed, but that its conduct of the litigation and the mixed results it obtained on the central issue (legality of billboard zoning regulations) militated against

fee shifting.[2] Aho v. Clark, supra, 608 F.2d at 367-368; Besig v. Dolphin Boating and Swimming Club, 683 F.2d 1271, 1279 (9th Cir. 1982). This is especially so in light of the other circumstances taken into account by the court.

---

2. In terms of the centrality issue and the equities of fee shifting, this Court should also consider the extent to which legal developments outside this case (here, the Metromedia decision in 1981) enabled Respondent to eventually claim status as a prevailing party. In a sense, Respondent's principal achievement in the case was in prolonging the litigation while other litigants established First Amendment billboard law. Even so, the new legal developments were not adverse to Petitioners, who readily agreed that billboard zoning controls should not restrict non-commercial speech. The equities therefore favor the action taken by the District Court in denying fees. Manhart v. City of Los Angeles, 652 F.2d 904, 910 (9th Cir. 1981) (Kilkenny dissenting); See also Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980).

The Ninth Circuit rejected the district court's consideration of Respondent's limited success. In its discussion of this portion of the district court opinion, the Ninth Circuit simply held that Respondent's financial motivation was irrelevant and refused to consider the relationship between the nature of the ruling and Respondent's actual objectives. When this relationship is taken into account, it is apparent that Respondent's success was only superficial. Respondent, a commercial billboard business, was not pursuing the litigation in order to insure that commercial speech not be given more protection than non-commercial speech.

The district court, in its ruling on the merits, had recognized that "In Metromedia, the Supreme Court held that an ordinance banning off-site

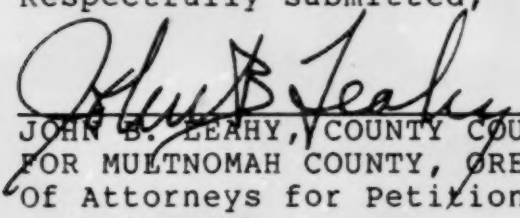
commercial billboards, but permitting on-site commercial billboards would be constitutional under the First Amendment." Appendix at 31. The district court was well aware that the facial defect in the ordinances being challenged could be easily cured and that the Respondent had not achieved the results which it sought. The Ninth Circuit refused to recognize this practical result as a valid reason for finding that fee-shifting was inappropriate in this case.

CONCLUSION

In view of the Ninth Circuit's refusal to allow consideration of the purposes of § 1988, and its refusal to allow consideration of the practical results obtained by the litigation, we ask this Court to grant certiorari to reject the Ninth Circuit panel's excessively narrow interpretation of a

district court's discretion to deny fees requested under 42 U.S.C. § 1988.

Respectfully submitted,



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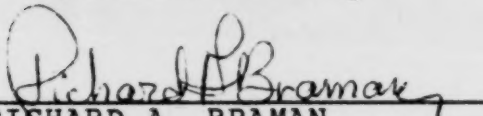

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APPENDIX A

ACKERLEY COMMUNICATIONS, INC., a Washington corporation, Plaintiff-Appellant, v. THE CITY OF SALEM, OREGON, a municipal corporation, Defendant-Appellee, and COUNTY OF MULTNOMAH, a home rule subdivision of the State of Oregon, Defendant-Intervenor-Appellee.	OPINION OF THE NINTH CIRCUIT Court of Appeals No. 83-3548 CV 75-733 FR FR
ACKERLEY COMMUNICATIONS, INC., a Washington corporation, Plaintiff-Appellant, v. THE CITY OF PORTLAND, OREGON, a political subdivision, of the State of Oregon, Defendant-Appellee,	CV 76-373 FR

Appeal from the U.S. District Court
for the District of Oregon
Hon. Helen J. Frye, Presiding

Argued and Submitted 7/3/84

Before SNEED, ALARCON, & NORRIS,
Circuit Judges

NORRIS, Circuit Judge:

The issue presented by this appeal is whether the district court abused its discretion under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, by refusing to award attorney's fees to appellant, Ackerley Communications, Inc. (hereinafter "appellant"). We hold that the district court did abuse its discretion and reverse and remand to fix the amount of fees to be awarded.

I

Appellant is an outdoor advertising company which owns advertising signs and structures in Oregon. Its billboards are used for both commercial and non-commercial messages.

Appellant brought this action to challenge the validity of ordinances of the cities of Salem and Portland and the county of Multnomah, which

regulated outdoor advertising signs. Appellant charged that the ordinances violated its rights to freedom of speech, due process, and equal protection and constituted a taking of property without just compensation. The ordinances were also challenged under certain provisions of state law.

The district court granted summary judgment to appellant on the ground that the ordinances violated the First Amendment. Appellant then moved for attorney's fees under 42 U.S.C. § 1988. The district court denied the motion finding that "special circumstances exist that render such an award unjust." Ackerley Communications, Inc. v. City of Salem, Oregon. No. 75-733-FR, slip op. at 3 (C.D.Or. Dec. 21, 1982) (hereinafter "Dist Ct. Op.").

We review the district court's denial of attorney's fees under the abuse of discretion standard. Sethy v. Alameda County Water District, 602 F.2d 894, 897 (9th Cir. 1979), cert. denied, 444 U.S. 1046 (1980). A determination by the district court will be reversed "where the district court misperceives the law or does not consider relevant factors and thereby misapplies the law." In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355, 1358 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982).

II

Section 1988 states, in pertinent part, that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The court's discretion

under section 1988 has been interpreted very narrowly. To act as an effective incentive for injured parties to seek judicial relief for civil rights violations, "fee awards should be the rule rather than the exception." Teitelbaum v. Sorenson, 648 F.2d 1248, 1251 (9th Cir. 1981). Thus, a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), cited in S. Rep. No. 94-1011, 94th Cong., 2d Sess at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910.

Here, the district court held that "special circumstances" justifying denial of a fee award did exist, based on four considerations. We will consider each in turn.

A. Motivation

The district court determined that appellant's primary motivation in bringing suit was financial gain, rather than an attempt to vindicate First Amendment rights. "The First Amendment claim was a means for the plaintiff, not an end." Dist. Ct. Op. at 4. The fact that a party has a financial interest in the outcome of litigation, however, is not a valid reason for denying attorney's fees under section 1988. Universal Amusement Co. v. Hofheinz, 616 F.2d 202 (5th Cir. 1980) is directly on point. There the plaintiffs were engaged in the business of either exhibiting, selling, distributing or leasing adult commercial films, books, magazines, newspapers or novelty items. Id. at 203-04. They successfully challenged under the First and

Fourteenth Amendments the constitutionality of ordinances which prohibited the operation of their businesses within two thousand feet of any church, school or other educational or charitable institution. Id. at 204. Notwithstanding the plaintiffs' obvious financial interest in the result, the Fifth Circuit reversed the district court's denial of a fee award under section 1988. Id. at 205; see also Sethy v. Alameda County Water District, 602 F.2d at 896, (plaintiff who received a personal damage award and reinstatement to employment entitled to fee award under section 1988); Universal Amusement Co. v. Vance, 587 F.2d 159, 172-73 (5th Cir. 1978) (en banc), aff'd 445 U.S. 308 (1981) (adult movie theater owners who successfully challenged constitutionality of Texas nuisance

statute as applied to obscenity entitled to attorney's fee under section 1988).

The district court attempted to distinguish such cases as Vance on the ground that the constitutional issues in those cases "were central to the case and crucial to the survival of the plaintiffs." Dist Ct. Op. at 4. This distinction is not valid. As the Supreme Court has said, "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not sufficient reason for reducing a fee. The result is what matters." Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

B. The Purposes of Section 1988

The district court reasoned that because appellant would have retained

competent counsel and initiated this action without the prospect of an attorney's fee, a fee award in this case would not further the statutory purpose of section 1988 "to enable private citizens who could otherwise not afford to vindicate their civil rights to do so," Dist. Ct. Op. at 4. Whether or not the action would have been brought in the absence of section 1988 is irrelevant. Thus, in Seattle School District No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980), a fee was awarded despite the district court's conclusion that an award was "not necessary" because the appellant was publicly funded. Id. at 1348. Moreover, a prevailing party who initiated an action before section 1988 was even enacted is nonetheless entitled to a fee award if the case was pending on the date of enactment.

Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978). See also Sethy, 602 F.2d at 897.

C. Benefits of the Decision

The third factor cited by the district court in denying a fee award is that "the invalidation of the ordinances primarily benefits the plaintiff." Dist. Ct. Op. at 5. The fact that the party who initiated the action is the primary beneficiary of its own success is not, however, a valid reason for denying fees under section 1988. As we stated in Seattle School District, "The congressional purpose in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law." 633 F.2d at 1348 (emphasis

added); see also American Constitutional Party v. Munro, 650 F.2d 184, 187 (9th Cir. 1981). Thus there are public interest considerations that transcend the conferring of a financial benefit on a prevailing party. As the district court itself noted, "The benefit conferred by the decision in this case is not a trivial one, and is theoretically of benefit to all the inhabitants of Multnomah County and the City of Salem." Dist Ct. Op. at 5. The societal importance of both commercial and non-commercial messages carried on billboards was noted by the Supreme Court in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

> "The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes."

Id. at 501 (quoting Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 888, 610 P.2d 407, 430-31, 164 Cal. Rptr. 510, 533-34 (1980)).

D. Equities

Finally, the district court concluded that the balance of equities and the hardship a fee award would impose favored denying appellant's request for attorney's fees. The court determined that "undoubtedly strategies would have changed somewhat had the defendants realistically expected that they might end up paying for the plaintiff's efforts. Governmental entities should not be intimidated in their functionings (sic) by the threat of attorney's fees." Dist. Ct. Op. at 5.

Once again, the district court based its decision on an interpretation of the purposes of section 1988 that is too narrow. As we have previously noted, an award of attorney's fees is "essential to effectuate the congressional purpose of encouraging future constitutional litigation in similar circumstances ...." Seattle School District, 633 F.2d at 1350. Attorney's fees under Section 1988 are thus not only an added burden to encourage voluntary compliance, but an entitlement to a prevailing party which encourages and facilitates access to the courts. Section 1988 was enacted for the very purpose of influencing governmental entities to make thoughtful efforts to avoid civil rights violations. See Seattle School District at 1348.

III

In conclusion, we find there is "a complete absence of any showing of special circumstances to render [the award of an attorney's fee] unjust." Universal Amusement Co. v. Hofheinz, 616 F.2d at 205. The district court is directed to grant a reasonable fee based upon the factors enumerated in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975) cert. denied, 425 U.S. 951 (1976).

REVERSED AND REMANDED.

Ackerley Communications, Inc. v. The City of Salem, Oregon, No. 83-3548

SNEED, Circuit Judge, Specially Concurring:

While I concur in the opinion of Judge Norris, I do so only because of the precedents he cites and not because

of any lack of sympathy with the viewpoint of the district court. That court, as I see it, attempted to interpret the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, so as to focus only on those cases in which the prospect of fee shifting reasonably could be said to have been marginally influential in the decision to litigate. That is the district court treated section 1988 as if it were intended only to be an inducement to litigate. On the other hand, the opinion of Judge Norris regards it as both an inducement and a reward for success in litigation. Moreover, the opinion can be read as holding that fee shifting is proper to reward success even when the prospect of fee shifting provided little or no inducement to bring the suit.[1]

The language of section 1988 would have permitted it to be interpreted as the district court suggests.[2] In my view, it should have been. To have done so would have been in keeping with the admonition to alter the American rule with respect to fees only to the extent required by the intent of Congress.[3] The precedents, however, point as Judge Norris indicates. Only the Supreme Court can alter that course. Therefore, I concur.

FOOTNOTES

1. See majority opinion, supra at ____.

2. See, e.g., Aho v. Clark, 608 F.2d 365, 367 (9th Cir. 1979) (no abuse of discretion where special circumstances existed and appellants were able to attract competent counsel); Buxton v. Patel, 595 F.2d 1182, 1184-85 and n.3 (9th Cir. 1979) (no abuse of discretion where, among factors considered, award of attorney's fees was found unnecessary to secure competent counsel and cost of attorney's fees was not a disincentive to the assertion of rights.)

3. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260-62 (1974).

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ACKERLEY COMMUNICATIONS, INC., a Washington corporation, Plaintiff v. THE CITY OF SALEM, OREGON, a municipal corporation, Defendant, COUNTY OF MULTNOMAH, a home rule subdivision of the State of Oregon, Intervenor.	)	Civil No. 75-733 FR ORDER
ACKERLEY COMMUNICATIONS, INC., a Washington corporation, Plaintiff, v. THE CITY OF PORTLAND, a political subdivision of the State of Oregon, Defendant.	)	Civil No. 76-373 FR

Plaintiff has moved for an award of attorney's fees under U.S.C. § 1988.

This litigation is part of a protracted political and legal battle between plaintiff, an outdoor advertising company, and defendants, political subdivisions of the State of Oregon. The dispute involves attempts by the local governments to regulate outdoor advertising. Plaintiff brought a multiple-count action, primarily claiming that the ordinance promulgated by the defendants amounted to a taking of property without just compensation, but also including a First Amendment claim. This court granted summary judgment for the plaintiff, holding the ordinances facially invalid because the ordinances as drawn could be interpreted as preferring commercial speech and certain forms of non-commercial speech over other forms of non-commercial speech. Hence, on the summary judgment motion, the issue

was one of statutory construction. See Opinion and Order of June 23, 1982 at 3.

In pertinent part, 42 U.S.C. § 1988 provides as follows:

> In any action or proceedings to enforce a provision of Section ... 1983 ... of this title ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The legislative history of this section indicates that congress intended the standard of awarding fees to be the same as under the fee provisions of the 1964 Civil Rights Act; that is, a successful party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, 390 U.S. 400 at 402, cited in S. Rep. No. 1011, 94th Cong., 2nd Sess. at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910.

This court will assume without deciding that plaintiff may recover under §1988 because it prevailed on its constitutional claim, notwithstanding its technical failure to plead a §1983 claim in its original complaint. Cf. Maher v. Gagne, 448 U.S. 122 (1980), Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981), cert. denied ___ U.S. ___, 102 S.Ct. 322 (1982). This court will also assume that fees may be awarded for a vindication of First Amendment rights. See Universal Amusement Corp. v. Vance, 587 F.2d 159 (5th Cir. 1978) (en banc), aff'd 445 U.S. 308, rehearing denied 446 U.S. 947 (1981). However, this court finds in its discretion, that attorney's fees should not be awarded to plaintiff in this case, because special circumstances exist that render such an award unjust.

Courts have formulated a variety of factors to be considered in deciding whether to award attorney's fees under §1988 in a given case. Among these are:

(1) Whether an award of fees furthers the purposes of §1988;

(2) the equities of the case;

(3) the size of the class benefited;

(4) the importance of the benefits achieved;

(5) the need for an award of attorney's fees to attract competent counsel;

(6) bad faith or obdurate conduct on the part of either party;

(7) an unjust hardship an award might impose.

See Seattle School District Number 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980), aff'd ___ U.S. ___, 102 S.Ct. 3187 (1982); Aho v. Clark, 608 F.2d 365 (9th Cir. 1979); Buxton v.

Patel, 595 F.2d 1182 (9th Cir. 1979); Zarcone v. Perry, 581 F.2d 1039 (2nd Cir. 1978).

The primary reason that fees will not be granted in this case is that the right which was vindicted [sic] in this case--the right to political or non-commercial speech--was not the primary objective of the plaintiff throughout this suit. The plaintiff was not primarily interested in furthering freedom of speech in this case; its objective was to find a way to keep the local government defendants from enforcing ordinances that threatened the plaintiff financially. The majority of the claims in plaintiff's original complaint were based on the taking of property without just compensation. The First Amendment claim was a means for the plaintiff, not an end.

This is not to say that the plaintiff's suit has not benefited anyone else. Vindication of fundamental rights is never trivial. Nor does the plaintiff's status as a business entity necessarily disqualify it from an award under §1988. Vance, supra. The distinction between this case and Vance lies in the centrality of the constitutional issue to the respective suits. In Vance, operators of adult theaters succeeded in having ordinances that allowed prior restraint declared unconstitutional. The constitutionality of the ordinances were [sic] central to the case and crucial to the survival of the plaintiffs. Here, in this six-year-long case, the issue of whether the ordinances violated the First Amendment is one issue among many.

In terms of the factors listed above, the court also finds that an award of fees in this case would not further the purposes of §1988. The purpose of §1988 is to enable private citizens who could otherwise not afford to vindicate their civil rights to do so:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Senate Report, supra, at 2; 1976 U.S. Code Cong. & Ad. News at 5910. Plaintiff in this case would have initiated legal action against the defendants regardless of whether it knew it could recover attorney's fees.

Plaintiff would have retained competent counsel, just as it did. Indeed, in 1975 plaintiff could not have relied on an award of fees in this case because the remedy it seeks did not then exist.

The benefit conferred by the decision in this case is not a trivial one, and is theoretically of benefit to all of the inhabitants of Multnomah County and the City of Salem; however, the invalidation of the ordinances primarily benefits the plaintiff.

Finally, the equities and the hardship that an award would impose argue against an award of fees in this case. During the long course of litigation and lobbying between plaintiff and defendants, undoubtedly strategies would have changed somewhat had the defendants realistically expected that they might end up paying for the plaintiff's efforts.

Governmental entities should not be intimidated in their functionings by the threat of attorney's fees. Also, it seems clear from the file number on this case that the plaintiff did not seek a rapid determination of the First Amendment issues. Rather, as has been stated, the First Amendment claim was a means for the plaintiff, not an end.

To conclude, the court finds that the special circumstances of this case make an award of attorney's fees under §1988 unjust. The plaintiff's motion for attorney's fees is denied.

Dated this 21 day of December, 1982.

/s/ Helen J. Frye
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ACKERLEY COMMUNICATIONS, INC., a Washington corporation, Plaintiff v. THE CITY OF SALEM, OREGON, a municipal corporation, Defendant, COUNTY OF MULTNOMAH, a home rule subdivision of the State of Oregon, Intervenor.	)	Civil No. 75-733 FR ORDER
ACKERLEY COMMUNICATIONS, INC., a Washington corporation, Plaintiff, v. THE CITY OF PORTLAND, a political subdivision of the State of Oregon, Defendant.	)	OPINION AND ORDER Civil No. 76-373 FR

FRYE, Judge:

This case is primarily a constitutional challenge to the sign

ordinances of the City of Portland (Portland), City of Salem (Salem) and Multnomah County. The plaintiff[1] filed suits against Portland and Salem, alleging that their sign ordinances violate its rights to freedom of speech, due process, and equal protection, constitute a taking of its property without just compensation, and cause uncompensated removal of signs within the area covered by the federal Highway Beautification Act, 23 U.S.C. § 131, contrary to ORS Chapter 377.[2]

Multnomah County intervened in the Salem suit.[3] Preliminary injunctions against enforcement of the ordinances were granted in both suits. In 1979, The Honorable James M. Burns granted partial summary judgment in favor of the plaintiff on the Highway Beautification Act issue.

In 1981, the defendants and intervenor filed motions to vacate Judge Burns' order and motions for summary judgment on all issues, on the ground that there are no issues of material fact and that they are entitled to judgment as a matter of law.[4] The defendants' and intervenor's motions to vacate Judge Burns' order are denied.[5]. The remaining motions are addressed below.

FIRST AMENDMENT

Several months after the defendants and intervenor filed their motions for summary judgment, the Supreme Court decided Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981). The parties filed supplemental memoranda, and the court heard oral argument on the impact of that decision on this case.

In Metromedia, the Supreme Court held that an ordinance banning off-site commercial billboards, but permitting on-site commercial billboards, would be constitutional under the First Amendment.[6] Id. at 2895. The plurality held, however, that an ordinance banning all non-commercial billboards, but permitting on-site commercial billboards violates the First Amendment because it values commercial speech over non-commercial speech. Id. Furthermore, an ordinance providing exceptions for some categories of non-commercial signs and not others impermissibly values some non-commercial speech over other non-commercial speech. Id. at 2896.

The defendants and intervenor argue that their ordinances are constitutional under the First Amendment because they ban only

commercial billboards. The plaintiff disagrees. Each ordinance is different and must be analyzed separately to determine whether it reaches protected non-commercial speech.

It is important to note that as a federal rather than a state court, this court does not have the authority to adopt an authoritative limiting construction of the ordinances. United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971). Cf. Metromedia v. City of San Diego, 26 Cal.3d 848, 164 Cal. Rptr. 510, 513 N.2, 610 P.2d 407, 410 (1980). (California Supreme Court construed ordinance to apply to billboards only, not to smaller signs); Metromedia, 101 S.Ct. at 2900 n.26 (Court suggested California Supreme Court could sustain San Diego ordinance by limiting its reach to commercial speech); State ex rel. Dept. of

Transportation v. Pile, 603 P.2d 337 (Okl. 1979). (State court construed ordinance to apply to commercial signs only). The court has ruled against abstention in this case. Therefore, it must determine the meaning of these ordinances as they are written.

A. Multnomah County

The Multnomah County sign ordinance prohibits outdoor advertising signs. The term "outdoor advertising sign" is defined by reference to ORS 377.710, which provides:

> "(25) 'Outdoor advertising sign' means a sign which advertises:
> "(a) Goods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located; or
> "(b) Facilities not located on the premises on which the sign is located."

Like the San Diego ordinance, this ordinance prohibits off-premise signs, but permits on-premise signs.[7]

Whether it prohibits only commercial signs or prohibits non-commercial signs as well depends on whether a sign carrying a non-commercial message may "advertise goods, products, services or facilities."

The Multnomah County ordinance, which bans all off-site "outdoor advertising signs" as defined by ORS 377.710, clearly prohibits billboards carrying certain kinds of non-commercial messages. The record before this court demonstrates that organizations have used off-site billboards to convey non-commercial messages which advertise goods, products, services, or facilities. Off-site billboards have advertised "Harry's Mother" (which provides help for runaways), Birthright (which provides help for pregnant women), the Portland Fire Department's campaign to

promote the use of smoke detectors, the Oregon Museum of Science and Industry, the Selective Service, and the Multnomah County District Attorney's Rape Victim Advocate Program.

Thus, under Metromedia, the Multnomah County ordinance violates the First Amendment in two ways. First, it bans some off-site non-commercial signs while permitting on-site commercial signs, thereby providing greater protection to commercial speech than to non-commercial speech. In Metromedia the Court said:

> "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages."

101 S. Ct. at 2895.

Second, the ordinance prohibits only those off-site non-commercial messages which advertise goods, products, services or facilities while it permits all other off-site non-commercial messages, thereby impermissibly favoring some non-commercial speech over other non-commercial speech. A city may not distinguish between, or evaluate the relative strengths of different categories of non-commercial speech. If some non-commercial messages may be conveyed, the city must also allow billboards conveying other non-commercial messages. Id. at 2896.

The political sign section of the Multnomah County Ordinance, § 12.615(a)-(c), requires separate consideration. A political sign is defined very broadly as, "A sign that advocates the election of a candidate

or the passage or defeat of a ballot measure." § 1.522. Section 12.615 goes on to state that political signs may be no more than four square feet in size. They may be erected no more than sixty days prior to an election and must be removed within seven days following an election. Thus, the only way to construe the ordinance is that it prohibits all political billboards and limits political lawn signs to a specific period of time.

There is no question that political signs as defined in the ordinance contain non-commercial messages. Yet the ordinance picks them out for especially harsh treatment. It values some kinds of commercial speech (on-site commercial billboards) and some categories of non-commercial speech (messages not covered by the ordinance at all) over political

speech. This is exactly what the Supreme Court held to be unconstitutional in Metromedia. Sections 12.615(a)-(c) violate the First Amendment.

B. City of Salem

The Salem ordinance is more comprehensive than Multnomah County's ordinance. It regulates the construction, maintenance, size, and location of all signs.

Primarily at issue here is one part of the ordinance which bans "advertising signs" from certain areas of the city. Those areas are: (1) "sign control zones" corresponding to the main traveled thoroughfares; (2) the central business district; (3) the Civic Center and Capitol Mall areas; and (4) within 300 feet of a residential or commercial office district. The ordinance permits

advertising signs in commercial (other than commercial office) and industrial zones only. Salem Revised Code §§ 62.508, 62.510, 62.515.

"Advertising sign" is defined as:

> "A sign[8] which advertises goods, products, businesses or services which are not sold, manufactured or distributed on or from the property or facilities not located on the property on which the sign is located."

Salem Revised Code § 62.050(t)(1).

Just as in Multnomah County, this definition sweeps within its scope some non-commercial signs which must be said to advertise goods, products, businesses or services. These non-commercial signs are banned from the designated areas, while on-site commercial billboards are permitted in these same areas. Although the ordinance does not create a city-wide ban, but affects only certain routes

and areas, it suffers from the same defect as the Multnomah County ordinance and the San Diego ordinance - it provides greater protection to commercial than to non-commercial speech. See Metromedia, 101 S. Ct. at 2895. The city does not explain why non-commercial billboards in those areas would create more of a traffic hazard or greater aesthetic harm than on-site commercial billboards would create. Cf. Id.

Furthermore, this definition of "advertising signs" has the effect of permitting some non-commercial messages, while banning other non-commercial messages. For example, a sign advocating "Save the Whales" would not "advertise a good, product, business, service or facility," while a sign advertising an organization that helps runaways does advertise a service

or facility. If some non-commercial messages may be conveyed in the sign control zones, billboards containing other non-commercial messages must be allowed. Id. at 2896.

Section 62.060(m), providing an exemption for political signs, requires separate consideration. That section provides that temporary signs on private property advertising candidates seeking public office or promoting the passage or defeat of a ballot measure are exempt from the ordinance. But such signs are limited to four square feet and are permitted only 30 days prior and seven days subsequent to any election.

Signs advertising candidates or promoting the passage or defeat of a ballot measure are clearly non-commercial signs. Yet they are treated more harshly than some

commercial signs. Commercial on-premise signs are permitted in the designated sign control zones at all times. Even an exempt sign advertising a garage sale may be left up indefinitely. § 62.060(n). Thus, this section violates the First Amendment by providing greater protection to commercial speech than to non-commercial speech.

C. City of Portland

The City of Portland prohibits "outdoor advertising signs" visible from certain designated highways.[9] The protected areas are called "S zones." Portland City Code Ch. 33.74. On-premise signs, designating the owner, tenant, occupant, main product manufactured or fabricated, or main goods sold or services rendered on the premises, are permitted in the "S zones."[10] § 33.74.030(4), (5).

The City of Portland also prohibits outdoor advertising signs in the downtown, or "C1" zone. § 33.44.130(e)(5). On-premise signs advertising the business or activity conducted on the premises, or goods for sale or services rendered from the premises are permitted. § 33.44.130(a), (b). Also permitted are signs which have been designated landmarks, on-premise real estate signs, and traffic and other public signs. § 33.44.130.

"Outdoor advertising sign" is defined as:

> "a sign which advertises a business or service which is not conducted or offered, or a product which is not the main product manufactured, distributed or sold upon the same property or premises upon which the sign is located."

Portland City Code. § 32.04.210.

Some non-commercial signs fall within this definition. For example, a billboard touting a draft counseling service, a family planning service, or the YWCA would advertise a "service" not located on the premises. These signs are prohibited in the "S" and "C1" zones, while on-site commercial signs are permitted. This affords greater protection to commercial speech than to non-commercial speech, in violation of the First Amendment. See Metromedia, 101 S. Ct. at 2895.

CONCLUSION

The court concludes that all three ordinances are facially unconstitutional.[11] The plaintiff did not file a cross-motion for summary judgment, but no purpose would be served by proceeding to trial.[12]

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. defendant City of Portland's motion to vacate partial summary judgment on the Highway Beautification Act issue, and motion for partial summary judgment on other issues are DENIED;

2. defendant City of Salem's motions to vacate and for summary judgment are DENIED;

3. intervenor Multnomah County's motions to vacate and for summary judgment are DENIED;

4. the court, on its own motion, GRANTS summary judgment in favor of the plaintiff.

DATED this 23rd day of June, 1982.

/s/ Helen J. Frye
United States District Judge

FOOTNOTES

1. The original plaintiff was Foster and Kleiser. Ackerley

Communications purchased Foster & Kleiser's business and was substituted as plaintiff during the pendency of this lawsuit.

2. The plaintiff also alleged that the Salem ordinance violates ORS 197.175(2) and LCDC guidelines.

3. The two cases have now been consolidated.

4. The City of Portland moved for "partial summary judgment on paragraphs VII and XII of the amended and supplemental complaint." But these paragraphs are the heart of the complaint; if partial summary judgment were granted, there would really be nothing left to resolve.

5. Judge Burns held that plaintiff was entitled to prevail on its claim under the Highway Beautification Act and related state statutes in ORS Chapter 377. The Ninth Circuit recently held that there is no private right of action under the Highway Beautification Act. National Advertising Co. v. The City of Ashland, No 81-3076 (9th Cir. May 26, 1982). The court remanded, however, for a determination of whether the City of Ashland's ordinance, which provided for take-down without compensation, was preempted by state law. I find that a local ordinance that requires take-down of signs within areas covered by the Highway Beautification Act without compensation is preempted by ORS 377.765, which provides that signs located in the area covered by the Highway Beautification Act shall be

removed upon payment of just compensation. Thus, Judge Burns' ruling that the plaintiff is entitled to prevail on its claims under ORS Chapter 377 is correct.

6. Justice Stevens joined the plurality in that part of the opinion to make a majority. Id. at 2909 (Stevens, J., dissenting).

7. "On-premise sign" is used here as it is defined in ORS 377.710(24) - a sign advertising the activities conducted on the property on which the sign is located.

8. "Sign" is defined as "an advertising sign, outdoor advertising sign, on-premise sign, display, temporary sign, message, light, emblem, device, figure, mannequin, painting, drawing, placard, poster or other thing that is designed, used or intended for an advertising purpose, or to inform or to attract the attention of the public, and includes, where applicable, the sign structure, display surface and all other components of the sign." § 62.050(t).

9. The designated highways are: (1) the approaches to all bridges across the Willamette River; (2) the Baldock Freeway; (3) the East Bank Freeway; (4) the Minnesota Freeway; (5) portions of Harbor Drive, Front Avenue, and Barbur Boulevard; (6) the Stadium Freeway; and (7) McLoughlin Boulevard. (Memorandum in Support of Defendant City of Portland's Motion for Partial Summary Judgment at 2).

An outdoor advertising sign may be permitted in these areas if special approval is obtained from the Sign Review Committee, and: (1) it is an existing sign, and only the back, not the copy, is visible from the highway; (2) it is primarily oriented toward other streets; or (3) it is placed flat against a building, or situated so that buildings form a visual background. § 33.74.040.

10. Also permitted are (other than outdoor advertising signs): (1) signs advertising the sale or lease of the property; (2) signs permitted in residential or apartment zones; and (3) signs designating a conditional use. §33.74.030(1)-(3).

11. In light of the court's conclusion that the ordinances are unconstitutional on First Amendment grounds, there is no need to reach the other constitutional and statutory issues raised by the plaintiff.

12. If defendants or intervenor claim that had plaintiff filed a motion for summary judgment, they would have submitted affidavits or other materials sufficient to create a genuine issue of material fact, they may file such materials within 20 days.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ACKERLEY COMMUNICATIONS, INC., Plaintiff-Appellant, v. THE CITY OF SALEM, OREGON, Defendant-Appellee, and COUNTY OF MULTNOMAH, Defendant-Intervenor-Appellee.	)	No. 83-3548 DC Nos. CV 75-733 FR
ACKERLEY COMMUNICATIONS, INC., Plaintiff-Appellant, v. THE CITY OF PORTLAND, Defendant-Appellee.	)	and CV 76-373 FR

Appeal from the U.S. District Court for the Portland District of Oregon.

THIS CAUSE came on to be heard on the transcript of the Record from the United States District Court for the Portland District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered January 30, 1985.

APPENDIX E

42 U.S.C. § 1988. Proceedings in vindication of civil rights, attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the

constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1984, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Office-Supreme Court, U.S.
FILED
MAY 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1695

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

COUNTY OF MULTNOMAH, a home rule subdivision of the State of Oregon, and THE CITY OF PORTLAND, OREGON, a political subdivision of the State of Oregon,

Petitioners,

v.

ACKERLEY COMMUNICATIONS, INC., a Washington corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether under 42 U.S.C. § 1988, which Congress enacted with the intent that successful civil rights plaintiffs would be awarded their reasonable attorney fees unless special circumstances would render such an award unjust, either of the following is a "special circumstance" which would make it unjust to award attorney fees to the plaintiff:

1. The plaintiff can afford to hire private counsel and would have chosen to litigate even if § 1988 had not made possible the recovery of attorney fees?

2. The plaintiff has a financial interest in the outcome of the litigation and challenges the validity of an ordinance on several statutory and constitutional grounds, leading the court to assume that the plaintiff's primary motive in challenging an unconstitutional ordinance was its own financial interest rather than

a concern for the vindication of constitutional rights in the abstract?

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No. 84-1695

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent accepts petitioners' statement of the parties to the proceeding, their citations of the opinions below, and their statements as to jurisdiction and the statutory provision involved.

RESPONDENT'S STATEMENT OF THE CASE

In these consolidated actions respondent[1] contended that each of three local ordinances which purported to regulate outdoor advertising signs was invalid. Respondent alleged from the outset that each ordinance violated the First Amendment to the United States Constitution in addition to alleging other federal claims and pendent state claims (Case No. 75-733, CR 1, 17; Case No. 76-373, CR 1). In each case respondent

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[1]The actions were originally filed by respondent's predecessor in interest, Foster and Kleiser. By stipulation, Ackerley Communications, Inc. was substituted as plaintiff after it purchased outdoor advertising signs which had belonged to Foster and Kleiser. The terms "respondent" and "plaintiff" are used in this brief without distinguishing whether the plaintiff at the relevant time was Foster and Kleiser or Ackerley Communications, Inc.

Corporate affiliates of Ackerley Communications, Inc. are listed, pursuant to Rule 28.1 of the rules of this Court, in Appendix C to this brief.

also alleged, from the outset, that its outdoor advertising signs are used for both commercial and noncommercial messages, including political messages, and that enforcement of the ordinances would prevent its display of political and noncommercial messages (*id.*). Shortly after the actions were filed, respondent obtained preliminary injunctions against the enforcement of the ordinances (Case No. 75-733, CR 8; Case No. 76-373, CR 9). From the outset respondent argued that each ordinance was invalid under the First Amendment.[2]

The district court's final judgments on the merits held that all provisions of the ordinances which prohibited the erection of, or required the removal of, outdoor advertising signs were void. The

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[2]Early in the proceedings it cited, among other authorities, the trial court decision in the case which this Court eventually decided in *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981) (Case No. 76-373, CR 3 at p. 5).

court permanently enjoined the enforcement of those portions of each ordinance (Appendices A and B to this brief).

The district court's opinion on the merits describes the proceeding as "primarily a constitutional challenge" to the three ordinances (Petition, App-28, ¶ 29). The court held that the Multnomah County ordinance violated the First Amendment in two ways and that it picked out political signs for especially harsh treatment (Petition, App-35-38). The City of Salem ordinance was invalid because, without explanation or justification, it provided greater protection to commercial than to noncommercial speech and singled out political signs for special prohibition (Petition, App-39-42). The City of Portland ordinance was unconstitutional because it afforded greater protection to commercial speech than to noncommercial

speech, prohibiting public service signs in areas where commercial signs would be allowed (Petition, App-42-44).

After judgment in its favor on the merits, respondent sought to recover its reasonable attorney fees pursuant to 42 U.S.C. § 1988. The district court refused to award any attorney fees on the ground that there were special circumstances which would render such an award unjust (Petition, App-21). Those circumstances, as identified by the district court, were: (1) plaintiff's primary objective in the litigation was not to protect the right to political or noncommercial speech but to prevent the enforcement of ordinances which threatened plaintiff financially (Petition, App-23); the First Amendment issue was only one among many (Petition, App-24); (2) an award of attorney fees would not further the statutory purpose because plaintiff would have initiated the actions whether or

not it could expect to recover attorney fees (Petition, App-25); (3) invalidation of the ordinances primarily benefited the plaintiff (Petition, App-26); (4) the equities favored defendants because defendants' litigation and other strategies would "undoubtedly" have been different if they had expected to pay plaintiff's attorney fees, because "[g]overnmental entities should not be intimidated in their functionings by the threat of attorney's fees," and because plaintiff did not seek a rapid determination of the First Amendment issues (Petition, App-26, 27).

The United States Court of Appeals for the Ninth Circuit held that none of the factors identified by the district court was the kind of "special circumstance" which would justify the denial of all attorney fees to a successful civil rights plaintiff. Specifically, the court held that (1) neither a financial interest in or

financial motivation for the litigation nor the fact that plaintiff asserted other grounds for the invalidity of the ordinances was an appropriate reason to deny all attorney fees (Petition, App-6-8); (2) the right to recover attorney fees under § 1988 is not limited to plaintiffs who would not have chosen to litigate without the prospect of recovering attorney fees (Petition, App-8, 9); (3) the fact that the plaintiff is the primary beneficiary of its own success is not a valid reason for denying attorney fees to a plaintiff whose litigation may serve to stimulate future voluntary compliance with the law and who has vindicated rights having social importance (Petition, App-10-12); (4) the district court had improperly balanced the equities because it had not taken into account the Congressional purpose to encourage future constitutional litigation and voluntary

compliance with the law (Petition, App-12-13).

ARGUMENT

I. The Writ Should Be Denied Because Petitioners' Contentions of Error and of Importance Are Based on Mistaken Assumptions.

Petitioners do not challenge the Ninth Circuit's holding that the district court misunderstood the purposes of 42 U.S.C. § 1988 and improperly balanced the equities as a result. Nor do they challenge the Ninth Circuit's holding that attorney fees may not be denied on the ground that plaintiff was the primary beneficiary of its own successful litigation. They rely on only two of the four reasons given by the district court to justify its refusal to award attorney fees.

In each instance petitioners' argument is based on a mistaken premise. Their first argument is based on much too narrow

an understanding of the purposes which Congress intended 42 U.S.C. § 1988 to serve. Their second argument is based on a misunderstanding of the district court's reasoning. The Ninth Circuit correctly understood both the Congressional purpose and the district court's opinion and rendered a decision which is correct and is consistent with Congressional intent and with the decisions of this and other courts.

II. The Petition Ignores the Congressional Purpose to Encourage Private Enforcement of Civil Rights by Creating a Right To Recover Attorney Fees.

The district court concluded that an award of attorney fees in this case would not further the purposes of § 1988 because the plaintiff was able to afford competent counsel and would have initiated legal action against these defendants without regard to the possibility of recovering

attorney fees (Petition, App-25). The statutory purpose, the district court believed, was to enable citizens who could not otherwise afford to vindicate their civil rights to do so through litigation (*id.*). Petitioners, like the district court, have assumed that that was Congress's only purpose in enacting the statute. It was not.

The purpose of § 1988 was not only to "eliminate financial barriers to the vindication of constitutional rights," but also to "stimulate voluntary compliance with the law." *Seattle School Dist. No. 1 et al v. State of Washington*, 633 F.2d 1338 (9th Cir. 1980) aff'd 458 U.S. 457 (1982).[3] The legislative history establishes that Congress intended § 1988 not only to assist civil rights plaintiffs who would not

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[3]Petitioners have quoted this same passage as a correct statement of the statutory purpose (Petition, 19) but their argument ignores its implications.

otherwise be able to afford to litigate but also to encourage vigorous enforcement of civil rights laws without creating an unnecessarily large governmental enforcement bureaucracy. S. Rep. No. 1011, 94th Cong., 2d Sess., 4 (1976), reprinted in 1976 U.S. Code Cong. & Adm. News 5908, 5911. In order to accomplish that purpose, Congress chose to compensate successful "private attorneys general" for the cost of civil rights litigation unless special circumstances made that compensation unjust in the particular case. *Id.* at 4-5; 1976 U.S. Code Cong. & Adm. News at 5912. The award of attorney fees was intended to be an entitlement in all but exceptional cases and to be an integral part of the remedy:

> "In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which [§ 1988] applies are to be fully enforced. We find that the effects of such fee awards are

> ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." *Id.* at 5; 1976 U.S. Code Cong. & Adm. News at 5913 (footnote omitted).

Where, as in this case, the appropriate remedy is injunctive relief against enforcement of an invalid law or ordinance rather than money damages, the provision for recovery of attorney fees is especially important. It does, of course, enable plaintiffs of limited means to litigate. In addition, however, it serves the important purpose of encouraging others with more resources to allocate some of those resources to civil rights litigation which benefits others as well as themselves:

> ". . . If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. . . ." *Id.* at 3; 1976 U.S. Code Cong. & Adm. News at

5910, quoting from *Newman v. Piggie Park Enterprises, Inc.*, 290 U.S. 400, 402 (1968).

Moreover, the prospect of having to pay the plaintiff's reasonable attorney fees provides a financial incentive to government to avoid actions which could violate the rights of its citizens and to avoid persisting in unconstitutional activity when its attention is called to violations of civil rights.

Recognizing these broader purposes of § 1988, the circuit courts of appeal have held or assumed that attorney fees pursuant to § 1988 may not be denied on the ground that the plaintiff was financially able to retain competent counsel. *See, e.g., International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980) (abuse of discretion to deny fees on ground that plaintiff was affiliated with a wealthy corporation which was able to pay private counsel); *Universal Amusement Co., Inc. v.*

Hofheinz, 616 F.2d 202 (5th Cir. 1980) (no special circumstances which would warrant denial of attorney fees although plaintiffs were nineteen businesses); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980) *cert. denied* 450 U.S. 919 (1981) (abuse of discretion to deny fees to movie theatre owner which successfully attacked zoning ordinance which would have prevented showing of "adult" movie in plaintiff's theatre); *Seattle School Dist. No. 1 et al. v. State of Washington*, 633 F.2d 1338 (9th Cir. 1980) *aff'd* 458 U.S. 457 (1982) (abuse of discretion to deny fees on the ground that award was not necessary because the prevailing parties were publicly funded).

Although this Court has not addressed the issue directly, it has impliedly held that attorney fees should not be denied on the ground that the prevailing party would have chosen to litigate without the

prospect of recovering fees. In *Hutto v. Finney*, 437 U.S. 678, 694-5 n. 23 (1978), rehearing den. 439 U.S. 1122 (1979) this Court held that § 1988 was applicable to cases filed before its enactment when those cases remained pending on its effective date. In many such cases the action must have been filed without the expectation that fees would be recovered.[4]

The Ninth Circuit's holding in this case that fees could not be denied because plaintiff's decision to litigate did not depend on the prospect of a fee award under § 1988 and because it could afford to hire competent counsel is neither novel nor improper. Rather, that holding is consistent with the avowed Congressional purpose, with assumptions underlying this

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[4]In some cases filed before this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1974) the plaintiffs may have hoped for fee awards under the equitable theories which that decision rejected.

Court's decision in *Hutto v. Finney*, *supra*, and with prior decisions in the same and other circuits.

III. The Petition Ignores the District Court's Mistaken Reliance on Plaintiff's Financial Objectives.

Part II of petitioners' argument (Petition, 23-29) mistakenly assumes that the district court refused to award attorney fees to plaintiff on the ground that its success in these actions was limited or merely technical. Plaintiff's success, however, was complete; the district court did not conclude otherwise.

Plaintiff sought declaratory relief and an injunction against the enforcement of each defendant's ordinance purportedly regulating or banning certain outdoor advertising signs; one of its stated reasons was that the terms of those ordinances violated rights of free expression guaranteed by the First

Amendment. The relief which plaintiff sought is precisely the relief it obtained in each case (Appendices A and B to this brief). Contrary to the assertions in the petition, plaintiff never contended that defendants were without power to regulate its sign structures at all. Plaintiff argued, rather, that the forms of attempted regulation which defendants had chosen were constitutionally impermissible. The district court agreed.

In denying plaintiff's request for attorney fees, the district court never said that plaintiff's success in these actions was limited or merely technical. Rather, as the Ninth Circuit correctly recognized, the district court's "primary reason" for refusing to award attorney fees was its belief that plaintiff's motive or major objective was to protect its own financial interests (Petition, App-23).

The Ninth Circuit correctly held that a civil rights plaintiff's financial interest in the outcome, whether or not that interest determines plaintiff's primary motive or objective,[5] is not a "special circumstance" which will justify withholding attorney fees under § 1988. In support of that holding it cited *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202 (5th Cir. 1980) *mod. and remanded on other grounds* 646 F.2d 996 (5th Cir. 1981) (reversing denial of fee award to plaintiffs who successfully challenged constitutionality of ordinances which would have prohibited the operation of their businesses in certain locations); *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir. 1978) (en banc), aff'd 445 U.S.

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[5]The record contains no factual support for the district court's conclusion about plaintiff's motives. Those motives were never put in issue. The district court's conclusion must have been entirely subjective and speculative.

308 (1981) (adult movie theater owners entitled to fee when they successfully challenged constitutionality of nuisance statute as applied to obscenity); and *Sethy v. Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979), *cert. denied* 444 U.S. 1046 (1980) (plaintiff who received personal damage award and reinstatement to employment was entitled to a fee).

Defendants have not suggested that those cases, and others with similar holdings, were incorrectly decided. See, e.g., *International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980) (abuse of discretion to deny attorney fee award on ground that the case involved "basically financial interests"); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert denied* 450 U.S. 919 (1981) (abuse of discretion to deny fees to movie theatre owner which successfully attacked zoning

ordinance which would have prevented showing of "adult" movies in plaintiff's theatre).

In summary, the Ninth Circuit correctly identified the district court's primary reason for refusing to award attorney fees. Having done so, it correctly held that financial motivations are irrelevant under § 1988. Its decision is consistent with those of other circuits.

The district court attempted to distinguish such decisions on the ground that, at least in one instance, the constitutional issue was "central to the case and crucial to the survival of the plaintiffs" whereas, in this case,

> ". . . the issue of whether the ordinances violated the First Amendment is one issue among many." (Petition, App-24)

However, as the Ninth Circuit correctly noted, the presence of other issues is not an appropriate reason for denying attorney fees:

> "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not sufficient reason for reducing a fee. The result is what matters." Petition App-8, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

In this case the result was totally favorable to plaintiff. The district court held for plaintiff on the only issues it had to decide. As a result plaintiff obtained all the relief which it had requested and the court did not have to reach additional constitutional and statutory issues. If that is not a reason to reduce a fee, it is certainly not a proper reason to refuse to allow any attorney fee at all.

CONCLUSION

The United States Court of Appeals for the Ninth Circuit, in holding that the district court abused its discretion in this case, has not announced any new principles of law. Petitioners have not

contended that the decision conflicts with any decision of this Court or those of any other circuit. The Ninth Circuit's decision properly applies § 1988, in light of clear Congressional purposes, to the specific facts of this case. Petitioners have not shown that the decision is incorrect or that the court's rationale contains anything which is likely to lead to improper results in other cases. The decision challenged by petitioners simply holds that, upon the facts of this case, it would not be unjust to require that petitioners pay a reasonable attorney fee to a plaintiff who has incurred such fees to establish through litigation that the

petitioners' ordinances violated the First Amendment. Review of that decision by this Court is not required.

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
DONALD JOE WILLIS
MILDRED J. CARMACK

By: _____
Donald Joe Willis
Counsel of Record
Of Attorneys for
Respondent

APPENDIX "A"

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ACKERLEY COMMUNICATIONS, INC., a Washington corporation; Plaintiff; v. THE CITY OF SALEM, OREGON, a municipal corporation; Defendant; COUNTY OF MULTNOMAH, a home rule subdivison of the State of Oregon; Intervenor.	)	Civil No. 75-733-FR FINAL JUDGMENT

Based on the Opinion and Order dated June 23, 1982,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Those portions of Salem Sign Code, Chapter 62, specifically including Sections 62.508, 62.510, 62.515, 62.516, 62.517, 62.518, 62.525, 62.530, and 62.540, and any other provisions incorporated into other ordinance sections within or without

Chapter 62 by virtue of the definitions in Sections 62.050(t)(1) and (9) or 62.060(m) of Chapter 62, (or the same provisions if now or later renumbered), which purport to prohibit the erection or maintenance of, or cause the removal of, "advertising sign(s)," "outdoor advertising sign(s)," "political sign(s)," or "sign(s)," insofar as the term "sign" includes any of the foregoing definitions, are declared void.

2. Those portions of Multnomah County Ordinance No. 100 now known as Multnomah County Code (MCC), specifically including MCC 11.15.8605 through MCC 11.15.8645 and any other provisions incorporated by virtue of the language in MCC 11.15.8645, which purport to prohibit the erection or maintenance of, or cause the removal of, "outdoor advertising sign(s)" or "political sign(s)," are declared void.

3. Those portions of the Salem Sign Code and the Multnomah County Code referenced above which purport to require the uncompensated removal of lawfully erected outdoor advertising signs within the areas covered by the Highway Beautification Act of 1965 (23 U.S.C.A. § 131) as amended are declared void.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the City of Salem, its officers, agents, attorneys, and any others acting in concert with it or them, are hereby permanently enjoined from directly or indirectly enforcing or attempting to enforce the portions of the Salem Sign code declared void herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the County of Multnomah, its officers, agents, attorneys, and any others acting in concert with it or them are hereby permanently enjoined from directly or indirectly enforcing or attempting to

enforce those portions of the Multnomah County Code declared void herein.

The court will determine the right of plaintiff to attorneys' fees upon motion and hearing, provided that any such motion shall be filed within 20 days of the entry of this Final Judgment.

DATED this 30 day of August, 1982.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

APPENDIX "B"

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ACKERLEY COMMUNICATIONS, INC., a Washington corporation; Plaintiff; v. THE CITY OF PORTLAND, a political subdivision of the State of Oregon; Defendant.	)	Civil No. 76-373-FR FINAL JUDGMENT

Based on the Opinion and Order dated June 23, 1982,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Those portions of the Code of the City of Portland, Oregon, Chapters 32 and 33 specifically, including Sections 33.74.020, 33.74.030, 33.74.040, 33.74.060, 33.74.080, and 33.44.130(e)(5), and any other provision or provisions incorporated in said chapters by virtue of the definitions contained in Sections 32.04.210 or 32.04.020 (insofar as

the latter section includes the former) which purport to prohibit the erection or maintenance of, or requires the removal of, "outdoor advertising sign(s)" or "sign(s)" (insofar as "sign(s)" includes "outdoor advertising sign(s)"), are declared void.

2. Those portions of the above-referenced ordinances which purport to require the uncompensated removal of lawfully erected outdoor advertising signs within the areas covered by the Highway Beautification Act of 1965 (23 U.S.C.A. § 131), as amended, are declared void.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the City of Portland, its officers, agents, attorneys, and any others acting in concert with it or them are hereby permanently enjoined from directly or indirectly enforcing or attempting to enforce the ordinances declared void herein.

The court will determine the right of plaintiff to attorneys' fees upon motion and hearing, provided that any such motion shall be filed within 20 days of the entry of this Final Judgment.

DATED this 30 day of August, 1982.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

APPENDIX "C"

RESPONDENT'S CORPORATE AFFILIATES

Ackerley Communications, Inc.,
a Delaware corporation
Ackerley Airport Advertising, Inc.,
a Washington corporation
Ackerley Communications of Florida, Inc.,
a Florida corporation
Ackerley Communications of Massachusetts,
Inc., a Massachusetts corporation
Ackerley Communications of the Northwest,
Inc., a Washington corporation
Ackerley Realty, Inc.,
a Washington corporation
Adshelters, Incorporated,
a Florida corporation
Empire Outdoor Advertising, Inc.,
a Florida corporation
Empire Outdoor Advertising of Massachusetts,
Inc., a Massachusetts corporation
Empire Outdoor Advertising of the Northwest,
Inc., a Washington corporation
KGET TV, Inc.,
a Washington corporation
KJR Radio, Inc.,
a Washington corporation
KKTV, Inc.,
a Washington corporation
Seattle SuperSonics, Inc.,
a Washington corporation
T.C. Aviation, Inc.,
an Oregon corporation
WIXT TV, Inc.,
a Washington corporation